

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

FILED
DEC 17 2007
U.S. DISTRICT COURT
SOUTH DAKOTA

UNITED STATES OF AMERICA, * CR 07-30070 (01) and (02)
*
Plaintiff, *
*
-vs-* ORDER AND OPINION
*
*
JESSE J. EAGLE ELK, SR., a/k/a *
"CHOPS" EAGLE ELK and *
CHEYENNE EAGLE ELK, *
*
Defendants. *

The defendant has filed a motion (Doc. 26) with a supporting memorandum (Doc. 27) to suppress statements and evidence. United States Magistrate Judge Moreno conducted an evidentiary hearing on December 4, 2007. The defendant and counsel for both parties were present. I have conducted a *de novo* review of the transcript (Doc. 59) and all other documents and exhibits. I have listened to the tape recorded statement (exhibit one from the evidentiary hearing) of the defendant.

The magistrate issued a report and recommendation (Doc. 57) after announcing his bench decision (Doc. 60). The recommendation is to grant the motion to the extent it seeks to suppress the defendant's statement (an answer to a police question) relating to the defendant's alcohol consumption to Christian Barrera on December 28, 2006, the portable breath test and the results thereof, and all the physical evidence found in and seized from the defendant's apartment on the same day. Portable breath tests are not scientifically reliable and are not to be admitted in any case. The recommendation is to otherwise deny the motion.

Both the government and the defendant have filed objections (Docs. 63 and 62 respectively), which are also without legal merit. The magistrate is fully capable of judging the credibility of the witnesses appearing before him. He fully considered the totality of all the circumstances. The report and recommendation should be adopted, the

motion granted in part as set forth above and otherwise denied, and the objections overruled.

Now, therefore,

IT IS ORDERED, as follows:

- 1) The motion (Doc. 26) to suppress statements and evidence is granted as described above. The suppression will cover the photographs taken in the apartment of the defendant (if the photos are ever found). It will also cover the sketch of the interior of the apartment made by Christian Barrera. The balance is denied.
- 2) The report and recommendation (Docs. 56 and 57) is adopted.
- 3) The statement by the defendant about his alcohol consumption after he was given the Miranda warning will be admissible for impeachment purposes only if and when the defendant testifies.
- 4) The objections (Doc. 62) of the defendant are overruled.
- 5) The objections (Doc. 63) of the government are overruled.

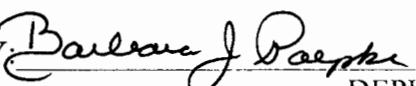
Dated this 17th day of December, 2007.

BY THE COURT:


CHARLES B. KORNMANN
United States District Judge

ATTEST:

JOSEPH HAAS, CLERK

BY 
Barbara J. Daepke
DEPUTY
(SEAL)